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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 548-549

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

MARGUERITE W. KEYES, RESPONDENT.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

MARGUERITE KEYES, INCORPORATED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN EACH OF THE ABOVE ENTITLED CASES.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN EACH OF THE ABOVE ENTITLED CASES.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner The Columbian National Life Insurance Company petitions for a writ of certiorari to the

Circuit Court of Appeals for the Eighth Circuit to review its decision in each of the cases, The Columbian National Life Insurance Company vs. Marguerite W. Keyes, and The Columbian National Life Insurance Company vs. Marguerite Keyes, Incorporated (Tr. p. 280) (not yet reported), affirming the separate judgments in each of said cases entered by the District Court of the United States for the Western Division of the Western District of Missouri.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On May 28, 1942, respondent Marguerite W. Keyes filed suit against your petitioner on a $25,000 policy of insurance issued by your petitioner on the life of her husband, George T. Keyes, in October, 1940. She sought recovery for the face of the policy, plus interest and plus statutory penalties and attorneys' fees under the statutes of the State of Missouri (Tr. 53-65).

On the same date, May 28, 1942, respondent Marguerite Keyes, Incorporated, filed suit against your petitioner on a $10,000 life insurance policy issued by your petitioner in June, 1941, on the life of said George T. Keyes (Tr. 29, 217).*

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*A third suit was filed at the same time, but that policy was not a binding receipt policy and, by its terms, became a binding contract upon delivery to assured in Missouri. After the District Court ruled on the combined motions to strike and for judgment on the pleadings, the Supreme Court of Missouri, in *Edwards* v. *Business Men's Assurance Co.*, 168 S. W. 2d 82, ruled on the only defense pleaded by your petitioner against your petitioner, whereupon your petitioner tendered the face of that policy, plus interest and costs. Since the only issue in that third case turns upon a review of the evidence and the sufficiency thereof to show vexatious refusal to pay, your petitioner is not petitioning for writ of certiorari in that third case. The District Court very properly found in that case that the policy had been delivered to the assured in Missouri (Tr. 13, Finding II).

On December 11, 1942, your petitioner filed its second amended answer in each of said cases (Tr. 91-96). The defense pleaded in each answer was that the assured in each of said policies of insurance, George T. Keyes, had committed suicide within two years from the date of the policy, thus, under a specific provision in each policy, limiting your petitioner's liability to the amount of the reserve under each policy.

The respondent in each of said cases, on the same date, filed in each of said cases a combined motion to strike from your petitioner's second amended answers all of the allegations in each of your petitioner's second amended answers relating to or connected with its defense of suicide and for judgment on the pleadings.

On January 27, 1943, the District Court entered an order and judgment in each case, sustaining respondents' combined motion in each case and for judgment on the pleadings and adjudging that the plaintiff (respondent) recover from the defendant (your petitioner) in the case of *Marguerite W. Keyes* v. *The Columbian National Life Insurance Company*, the sum of $25,000 with interest thereon and the further sum of $2,500 as a penalty for vexatious refusal to pay, and the further sum of $5,000 as and for attorneys' fees (Tr. pp. 27-28), and adjudging in the case of *Marguerite Keyes, Incorporated*, v. *The Columbian National Life Insurance Company* that the plaintiff (respondent) have and recover from the defendant (your petitioner) the sum of $10,000 with interest thereon, and the further sum of $1,000 as a penalty for vexatious refusal to pay, and for the further sum of $2,000 as and for attorneys' fees (Tr. p. 30).

The answers in the two cases are, *mutatis mutandis*, identical. The facts pleaded in each answer as well as all inferences reasonably to be drawn therefrom were, and are, by the combined motion to strike and for judgment on the pleadings, conceded to be true.

The facts stricken from the answers (except the denials of allegations in the petitions contained in the parts

stricken) by the District Court on respondent's combined motions to strike and for judgment on the pleadings are substantially as follows: The two policies sued on, except as to the dates of issue, the amounts of insurance provided and the names of the beneficiary, are identical (Tr. pp. 57-205), and are what is known as binding receipt policies.

The assured committed suicide, dying on the 10th day of April, 1942, from gun shot wounds, suicidally inflicted on or about March 23, 1942.

The policies sued on were Massachusetts contracts, made, issued, executed and delivered by your petitioner to the assured therein, George T. Keyes, in the State of Massachusetts.

At the time of the execution by said George T. Keyes of the applications for the policies, George T. Keyes paid the first premiums thereon. Coincident with the execution of the application for each policy by said George T. Keyes, your petitioner executed and delivered to said George T. Keyes its binding receipt for said first premium, which binding receipt was accepted by said George T. Keyes and in the Marguerite Keyes, Incorporated, case by that Company also and "which binding receipt was a part of the contract of insurance, and which, until torn off the said application and delivered to said George T. Keyes, was physically a part of said application."

Each binding receipt provided that The Columbian National Life Insurance Company had received from said George T. Keyes the first premium on a proposed insurance as of the date of the application therefor, and further provided for such insurance to be in force from the date of the completion of Part II of the examination in said application (the personal statements made by said George T. Keyes and recorded by your petitioner's medical examiner), provided, however, that your petitioner, at its home office in Boston, Massachusetts, should be satisfied that on said date the applicant, George T. Keyes,

was insurable in accordance with your petitioner's rules, at standard rates, and should approve said insurance for the amount and on the plan applied for without modification, and further provided that such approval by your petitioner should constitute, in effect, a delivery of the policy (Tr. p. 92).

Your petitioner when it received said applications at its home office in Boston, Massachusetts, being satisfied that on the date of the completion of Part II of said applications, said George T. Keyes was insurable according to its rules at standard rates, approved the insurance in each case for the amount and on the plan applied for without modification. Such approval was the last act necessary to make the contracts of insurance binding and completed contracts, and this last act having been performed in the State of Massachusetts, the contracts of insurance sued on were, in fact, Massachusetts contracts.

Each policy of insurance provides:

> "Death within two years from date of policy from suicide, while sane or insane, shall reduce the company's liability hereunder to the amount of the reserve hereon."

The amount of the reserve on the policy in each case was tendered to the plaintiff therein and paid to the Clerk of the District Court for the use and benefit of the plaintiff therein (Tr. p. 94).

Each application for the proposed insurance contained a provision that any policy issued thereon should be considered a Missouri contract and construed in accordance with the law of Missouri unless otherwise specified by the applicant. Under the law and public policy of Massachusetts, suicide is a very wicked crime and it is against the law and public policy of the State of Massachusetts to pay life insurance benefits on account of death produced by suicide. The contracts sued upon being Massachusetts

contracts, and therefore to be construed in accordance with the laws of the State of Massachusetts, and the insured in each policy, George T. Keyes, having committed suicide within two years from the respective dates of the contracts of insurance, the provision in the policies limiting the liability of your petitioner to the reserve on each contract was valid and enforceable (Tr. pp. 94, 241, 242).

The contracts of insurance sued upon being Massachusetts contracts, the provision in the applications that they should be considered and construed as Missouri contracts was unenforceable and of no effect because to so construe them and to write into them the Missouri suicide statute would be against the law and public policy of the State of Massachusetts, which law and public policy were a part of the contract and governed the construction to be placed upon their terms and conditions (Tr. pp. 94, 95, 242, 243).

Each policy of insurance sued upon provided that it was to be performed at Boston, Massachusetts (Tr. pp. 57, 205).

In each of its answers, your petitioner denied generally that its refusal to pay was vexatious or that it was liable for the Missouri statutory penalties for vexatious refusal to pay (Tr. p. 93).

The District Court did not find that either of the policies sued upon in these two cases was delivered to George T. Keyes in the State of Missouri. In the case of *Marguerite W. Keyes, plaintiff,* v. *The Columbian National Life Insurance Company, defendant,* the District Court found that the policy there involved was "delivered to George T. Keyes, the insured, while he was a resident of the State of Missouri" (Tr. p. 10, Finding of Fact 2). In the case of *Marguerite Keyes, Incorporated,* v. *The Columbian National Life Insurance Company,* no place of delivery of the policy was found by the District Court, the finding of the District Court in that regard being that the policy was delivered to Markay, Incorporated, a Mis-

souri corporation, and its successor, Marguerite Keyes, Incorporated (Tr. p. 16, Finding of Fact 2).

JURISDICTION.

The jurisdiction of this court is invoked by your petitioner for writs of certiorari under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938 (Title 28, U. S. C. A., Sec. 347), and under the same act, Ch. 229, Sec. 8, 43 Stat. 940 (Title 28, U. S. C. A., Sec. 350), and under *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 302, 58 S. Ct. 860, 82 L. Ed. 1920.

The Date of the Judgment to Be Reviewed.

The judgment of the Circuit Court of Appeals in each case affirming the judgment in each case of the District Court with an order of remittitur of attorneys' fees was entered on the 25th day of October, 1943 (Tr. pp. 287, 289); rehearing denied November 16, 1943 (Tr. p. 307).

QUESTIONS PRESENTED.

I.

Where an applicant for insurance policies, a resident of Missouri, executes applications for such policies in the State of Missouri, and at the time of the execution of such applications pays the first premiums upon the proposed insurance to the agent of the insurance company, and where coincidentally with the execution of said applications and the payment of said first premiums, the applicant accepts binding receipts executed by the insurance company and delivered by the insurance company to such applicant, which binding receipts acknowledge the receipt of the first premiums on the proposed insurance on a specified plan and provides that the insurance applied for shall be in force from the date of such appli-

cations, provided that the insurance company, at its home office in Boston, Massachusetts, shall be satisfied on said date that such applicant was insurable in accordance with its rules at standard rates, and shall approve, for the amount and on the plan applied for without modification, and which binding receipt further provides that such approval shall constitute, in effect, a delivery of the policy, and where, upon receipt of said applications at its home office in Boston, Massachusetts, said insurance company is satisfied that on the date of the execution of the applications the applicant was insurable in accordance with its rules at standard rates and approves for the amount and on the plan applied for without modification, and after such approval mails the policies issued on such applications to its agent in Missouri for unconditional delivery to the applicant, did not the contracts, upon such approval and at the place of such approval, to-wit, Boston, Massachusetts, become binding contracts, and are not such contracts Massachusetts contracts?

II.

Is not the place where the final act occurs which makes a binding contract the place of contract?

III.

Must not questions of interpretation of contracts and the validity thereof be determined by the law of the state where the contracts were made?

IV.

Is not the Missouri Suicide Statute, Sec. 5851, R. S. Mo., 1939, reading:

> "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or

> jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

wholly inapplicable in a suicide case, in interpreting and determining the validity and legal effect of a contract made in the State of Massachusetts?

V.

If a contract of insurance is a Massachusetts contract, the last act necessary to making it a binding contract having occurred in Massachusetts, and if such contract contains the provision that it shall be considered a Missouri contract, and that its terms shall be construed in accordance with the laws of the State of Missouri, and if it is against the public policy of Massachusetts to allow or permit a recovery upon such contract of insurance, is not such a provision that the contract shall be considered a Missouri contract and construed in accordance with the the laws of Missouri void and unenforceable where the insured in such contract of insurance commits suicide?

VI.

Is not a provision in a Massachusetts contract of insurance, reading:

> "Death within two years from date of policy from suicide, while sane or insane, shall reduce the company's liability hereunder to the amount of the reserve hereon"

valid and enforceable in the courts of Missouri and in the Federal Courts in Missouri notwithstanding the Missouri Suicide Statute (Sec. 5851, R. S. Mo., 1939) set out above in "Question Presented IV"?

VII.

Is not the specific provision in these contracts, which were made and executed in Massachusetts and became binding contracts in that State, and are, therefore, Massachusetts contracts, reading:

> "Death within two years from date of policy from suicide, while sane or insane, shall reduce the company's liability hereunder to the amount of the reserve hereon"

controlling over a general provision in the contracts, reading:

> "Any policy of insurance issued upon this application shall be considered a Missouri contract and its terms shall be construed in accordance with the laws of the State of Missouri unless otherwise specified herein by the applicant"

and is not such specific provision in such Massachusetts contracts valid and enforceable notwithstanding such general provision in the contracts, and therefore notwithstanding the Missouri Suicide Statute, Sec. 5851, R. S. Mo., 1939?

VIII.

Can the beneficiaries in contracts of insurance made in Massachusetts, and therefore Massachusetts contracts, recover from the insurance company making such contracts statutory penalties and attorneys' fees provided for by Sec. 6040, R. S. Mo., 1939, reading:

> "In any action against any insurance company to recover the amount of any loss under a policy of * * * life * * * insurance, if it appears from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed ten per cent on the amount of the loss and a reasonable attorney's fee; * * *"?

IX.

Can a statement of fact by a Circuit Court of Appeals in its opinion, which has no support in the findings of fact by the District Court, and which is contrary to all of the conceded and admitted facts in the record, receive any consideration or be given any effect by this Court in considering a petition for writs of certiorari and in considering and determining the merits of the cases?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRITS.

I.

The Circuit Court of Appeals held "We find no merit in the plea that construction of the insurance contracts was controlled by Massachusetts law.

This holding is in conflict with the following decisions of the Supreme Court of Missouri:

Daggett v. Kansas City Structural Steel Company, 334 Mo. 207, 65 S. W. 2d 1036;

Ruhe v. Buck, 124 Mo. 178, 27 S. W. 412;

State ex rel. Equitable Life Assurance Society of the United States v. Robertson et al., Judges, 191 S. W. 989 (not officially reported);

Bearup v. Equitable Life Assurance Society of the United States, 172 S. W. 2d 942 (not yet officially reported);

Illinois Fuel Co. v. Mobile & O. R. Co., 319 Mo. 899, 8 S. W. 2d 834;

and with the following decisions of the courts of appeal of the State of Missouri:

Rowland v. Missouri State Life Insurance Company, 48 S. W. 2d 31 (not officially reported);

Pickett v. Equitable Life Assurance Society of the United States, 27 S. W. 2d 452 (not officially reported);

Fields v. Equitable Life Assurance Society of the United States, 118 S. W. 2d 521 (not officially reported);

and is also in conflict with Mutual Life Insurance Company of New York v. Liebing, 259 U. S. 209, 42 S. Ct. 467, 468.

Under the conceded facts the last acts necessary to make these contracts binding contracts occurred in Boston, Massachusetts. Therefore, the contracts were and are Massachusetts contracts.

In *Daggett* v. *Kansas City Structural Steel Company*, 334 Mo. 207, 65 S. W. 2d 1036, 1039, the Supreme Court of Missouri said:

> "It is settled law that the place where the final act occurs which makes a binding contract is the place of contract."

In the case of *Bearup* v. *Equitable Life Assurance Society of the United States*, 172 S. W. 2d 942, the policy of insurance involved was a life policy with a double indemnity provision in the event of accidental death. The insured committed suicide while insane. Under the law of New York, an insane suicide was not an accident. Under the law of Missouri, an insane suicide was an accident. In that case, a binding receipt, substantially similar to the binding receipts in the cases at bar, was executed by the insurance company, delivered to the insured, and accepted by him. The ruling of the Supreme Court is concisely stated in paragraphs 6 and 7 of the syllabi, as follows:

> "6. Parties may lawfully contract as to place of acceptance and the effective date of contract of insurance.
>
> "7. Where parties agreed life policy should take effect as of date of receipt issued for first premium payment provided application taken in Missouri was accepted by insurer's authorized officers in New York, the insurance contract completed by acceptance of ap-

plication was a New York contract governed by New York law that death by suicide while sane or insane is not accidental death. Mo. R. S. A., Sec. 5851."

In the case of *Fields* v. *Equitable Life Assurance Society of the United States*, 118 S. W. 2d 521, the policy had been applied for by a citizen of Missouri in the State of Missouri. A binding receipt, in substance similar to the binding receipts in these cases, was delivered to the insured and accepted by him at the time of the signing of the application. The policy contained the usual provision relieving or restricting the company's liability in the event of suicide. The insured committed suicide. The defense of the insurance company was predicated upon the provision relieving it from liability in the event of suicide, the insurance company contending that under the binding receipt the contract was a New York contract, governed by the laws of New York, under which the provision against suicide was recognized as a valid defense. Plaintiff contended that the contract was a Missouri contract, to be construed under the laws of Missouri. In ruling against the contention of the plaintiff, the Kansas City Court of Appeals said, on page 524 of its opinion:

"For the protection of our citizens we have attempted by law to vouchsafe to our citizens who do business with foreign companies organized to do business in this state the same rights as they have when doing business with a company chartered in Missouri. *However, it is the law of this state, when the question is duly raised, that the law of the state wherein the last act necessary to create the contract and give it legal effect as a contract is performed is the law by which issues growing out of the contract is to be determined.* * * *

"In the case at bar the first installment of premium was paid when the application for insurance was made and a 'binding receipt' was issued to the applicant. * * *

"It will be noted that the place of acceptance is in the state of New York, and further that said ac-

ceptance is the last act necessary to complete the contract. From and after said acceptance the contract is in full force and effect and same is true although policy is not then issued or delivered. Without the issuance of a policy or without the delivery of the policy the acceptance creates a completed contract that can be enforced by the courts of this state" (Emphasis ours).

To the same effect are the cases of *Rowland* v. *Missouri State Life Insurance Company,* 48 S. W. 2d 31, 33, 34; *Illinois Fuel Co.* v. *Mobile & Ohio R. Co.,* 8 S. W. 2d 834, 838, and *Pickett* v. *Equitable Life Assurance Society of the United States,* 27 S. W. 2d 452, 454, and *Mutual Life Ins. Co.* v. *Liebing,* 259 U. S. 209, 42 S. Ct. 467, 468.

This Pickett case was a binding receipt case and the Court, after discussing the effect of an unconditional acceptance of the application thereunder, said:

> "We think, therefore, that there can be no doubt that the contract was consummated in New York, and is to be governed by the laws of that state."

In *Ruhe* v. *Buck,* 124 Mo. 178, 183, 27 S. W. 412, the Supreme Court of Missouri said:

> "Matters bearing upon the execution, interpretation, and the validity of a contract are determined by the law of the place where the contract is made."

II.

This holding of the circuit court of appeals, "we find no merit in the plea that construction of the insurance contracts was controlled by Massachusetts law," is in conflict also with the following decisions of the Supreme Court of Missouri:

Prentiss v. Illinois Life Ins. Co., 225 S. W. 2d 695, 705 (not officially reported);

Parker v. Aetna Life Insurance Company, 289 Mo. 42, 232 S. W. 708, and

Lukens v. International Life Insurance Company, 269 Mo. 574, 191 S. W. 418.

Under the law of Missouri, as announced in the cases cited under the first reason assigned for the allowance of the writs, *supra*, and under the decisions of this Court, these contracts were clearly Massachusetts contracts, and their interpretation and validity must be determined by the law of Massachusetts. The Missouri Suicide Statute has no extra-territorial force. It has application only to contracts made in Missouri with citizens of Missouri.

The policy involved in the case of *Lukens* v. *International Life Insurance Company*, 269 Mo. 574, 191 S. W. 418, was an Illinois contract. The policy contained a provision that in case of suicide committed within one year from the date of issuance of the policy, the recovery under the policy should be limited to the premiums paid. The insured suicided within one year. The court said, on page 419:

> "The first question challenging attention is whether the contract sued upon is governed by the laws of Missouri or Illinois, and this depends upon where it was finally consummated."

In referring to the Missouri Suicide Statute, the Missouri Supreme Court further said, on page 421 of the opinion:

> "If the contract was an Illinois contract and by reason thereof governed by the laws of that state, as we hold, although the suit is brought in the courts of this state, none of the provisions of the section are applicable to respondent's case nor available to her. The section, when correctly construed, is but an inhibition against making insurance contracts *in this state* and with citizens of this state whereby the insurer is relieved from liability in the event the insured commits suicide. The only right, privilege, or immunity which it denies is the right to contract that in case of suicide the contract obligation shall not be effective, *and this denial or abridgment extends only*

to the citizens of this state and insurers while contracting in this state. * * * Absent statutes to the contrary in the place where the contract is made, this is legitimate subject-matter of contract. If the laws of the state where the contract is made do not deprive the parties of the right to limit liability to death from natural or accidental causes, the right to so contract cannot be questioned, and, when exercised, must be respected" (Emphasis ours).

To the same effect are *Prentiss* v. *Illinois Life Ins. Co.*, 225 S. W. 2d 695, 705; *Parker* v. *Aetna Life Insurance Co.*, 289 Mo. 42, 232 S. W. 708.

It seems clear, therefore that the construction of the insurance contracts in these cases is controlled by Massachusetts law.

III.

The circuit court of appeals held that the provision in the contracts that they "should be considered Missouri contracts and be construed in accordance with the laws of Missouri was perfectly valid and binding and required the Missouri court to apply the Missouri law on the trial of the cases in Missouri." This holding is in conflict with the decisions of the Missouri Supreme Court in Lange v. New York Life Insurance Company, 254 Mo. 488, 498, 162 S. W. 589, and with the decision of this court in Mutual Life Insurance Company v. Hill, 193 U. S. 551, 554, 24 S. Ct. 538.

The final acts necessary to make the contracts in these cases binding contracts having occurred in Massachusetts, these contracts are Massachusetts contracts. If, therefore, the Missouri Suicide Statute is to control in construing the contracts, it must be by virtue of the terms of the contracts and not because the contracts are Missouri contracts.

In *Lange* v. *New York Life Insurance Co.*, 254 Mo. 488, the policy had been lapsed by the company for non-

payment of a premium. The policy contained a provision that delivery and acceptance of the policy should constitute notice of the due date of the premium and expressly waived any further notice required by any statute. The policy also provided:

> "That the contract contained in said policy and in this application shall be construed according to the law of the State of New York, the place of such contract being agreed to be the home office of said company in the city of New York."

In fact, the contract was a New Mexico contract. The plaintiff contended that by virtue of the provision in the contract that the contract should be construed in accordance with the laws of New York, the New York statute, which provided, in substance, that no life insurance company doing business in New York should have power to lapse any policy by reason of nonpayment of the premium without first having given the assured thirty days written or printed notice, controlled, and that such notice not having been given to the assured, the lapsing of the policy by the company was not effective. The company contended that the contract, being in point of fact a New Mexico contract, the laws of New York did not control, and that the specific provision waiving notice of the due date of the premium controlled over the general provision that the contract should be construed according to the laws of New York. Speaking to the point that if the New York statute requiring forfeiture notice was to control in construing the contract, it had to be by virtue of the terms of the contract and not because the contract was a New York contract, the Supreme Court of Missouri said:

> "The application for the policy was made and the policy delivered in the Territory of New Mexico. Such being the fact, it is too well settled to need citation of authority that the contract of insurance was a New Mexico contract. *If, then, the New York statute requiring forfeiture notice is to control in construing the contract, it must be by virtue of the terms*

of the contract of insurance, and not because the policy is a New York contract. This distinction is material" (Emphasis Ours).

There can be no question but that parties contracting in a state may agree that their contract shall be construed under the laws of some other state, provided thereby they do not contract away or annul the public policy of the state where the contract is made. On this proposition, the Supreme Court of Missouri, in the Lange case, continuing the pronouncement above set forth, said:

> "Had the policy been executed in the State of New York, the statute quoted in the above statement would control whether or not referred to in the policy contract *and even though the policy contract said that it would not control; this for the reason that persons contracting within a state are not permitted to contract away or annul the public policy statutes thereof.* On the other hand, if not in contravention of the laws and public policy of the place of contract, the contracting parties may stipulate to the effect that the laws, or a portion of the laws, of a foreign state shall control in construing the contract" (Emphasis Ours).

Of course, the public policy of a state may be found in the judicial records of the state, as well as in its statutes and in its constitution. In the case of *Order of United Commercial Travelers* v. *Meinsen et al.,* 131 F. 2d 176, the Court of Appeals of the Eighth Circuit said:

> "By the public policy of a state is meant 'the law of the state, whether found in the constitution, the statutes, or judicial records.' "

The Missouri court, in the *Lange* case, cited and followed *Mutual Life Insurance Co.* v. *Hill,* 193 U. S. 51, on this proposition. Therefore, in testing the validity of the provisions in these contracts that they should be considered Missouri contracts and construed in accordance with the laws of Missouri, and hence, in determining whether the Missouri Suicide Statute should be read into the contracts

so as to nullify the provisions in the contracts limiting the recovery to the reserve in the event the assured committed suicide, we have to look to the public policy of the State of Massachusetts, the place where these contracts were made.

The Circuit Court of Appeals said "We cannot be concerned with the course the defense of suicide might have taken in trials in Massachusetts on the same insurance contracts." In this, the Circuit Court of Appeals was clearly wrong. Under the decisions of the Missouri courts, the Circuit Court of Appeals was required "to be concerned with the course the defense might have taken in trials in Massachusetts on the same insurance contracts."

Now, there can be no question but that reading the Missouri Suicide Statute into these contracts by construction would "to contract away and annul" the public policy of the State of Massachusetts, as declared by the Supreme Court of that state.

In *Silva* v. *The Fidelity and Casualty Company,* 252 Mass. 328, 330, 147 N. E. 858, the Supreme Court of Massachusetts, speaking through Rugg, Chief Justice, said:

> "Voluntary self destruction is contrary to the common conduct of mankind. It is a crime involving a high degree of moral turpitude."

In *Davis* v. *Supreme Council of Royal Arcanum,* 195 Mass. 402, 81 N. E. 294, plaintiff was a widow and beneficiary of the assured in the policy sued upon. The policy contained no provision in regard to death by suicide. In its answer, the defendant alleged that the assured committed suicide by voluntarily shooting himself while sane, and that by reason of this act, the policy was null and void. The Supreme Court of Massachusetts, on pages 407 and 408 of the official report, said:

> "It is settled upon sound principles, and by a great weight of authority, that, even if an ordinary policy of life insurance contains no provision in regard to death by suicide, there is no liability under it

to the legal representatives of the insured, if his death is intentionally caused by himself when of sound mind. *Hatch* v. *Mutual Ins. Co.*, 120 Mass. 550. *Ritter* v. *New York Ins. Co.*, 169 U. S. 139. *Burt* v. *Union Central Ins. Co.*, 187 U. S. 362. *Shipman* v. *Protected Home Circle*, 174 N. Y. 398. *Supreme Commandery* v. *Ainsworth*, 71 Ala. 436. *Hopkins* v. *Northwestern Life Assurance Co.*, 94 Fed. Rep. 729, 731. *Amicable Society* v. *Bolland*, 4 Bligh (N. S.) 194, 211. * * *

It is an implied condition of the policy that the insured shall not take his own life. *Weber* v. *Knights of Maccabees*, 172 N. Y. 490, 493. In the words of the court in *Shipman* v. *Protected Home Circle*, 174 N. Y. 398, 405:

> 'It is a fundamental, though unexpressed, part of the original contract that the insured should not intentionally cause his own death.'

This is equivalent to saying that as a matter of construction of the contract, there is, in the promise to pay on the death of the insured, an implied exception of death by his own intentional act while he is of sound mind. *It is said in the cases that it would be against public policy to make or enforce a contract to pay one's estate a sum of money on his death by suicide.* See *Ritter* v. *New York Ins. Co.*, 169 U. S. 139, 154. This is a statement, in another form, of the reason for holding that, in a policy that is silent as to suicide, death by suicide is impliedly excepted from the conditions which create a liability" (Emphasis Ours).

In the Davis case, the Court followed the case of *Hatch* v. *Mutual Life Insurance Company*, 120 Mass. 550, 21 Am. Rep. 541. The policy in the Hatch case contained a provision that if the person whose life was thereby insured should die by her own act or hand, whether sane or insane, or in consequence of a duel, or of the violation of the laws of any nation, state or province, then, and in every such case, the policy should be null and void.

The insured died by reason of an illegal operation for abortion, voluntarily submitted to by her. The Supreme Court of Massachusetts, on page 55 of the official report, said:

> "It is therefore established that this voluntary act on her part, condemned alike by the laws of nature and by the laws of all civilized states, and known by her to be dangerous to life, did actually result in death. * * * "We are of opinion that no recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this Commonwealth. See *Amicable Society* v. *Bolland*, 4 Bligh N. R. 194; *Horn* v. *Anglo-Australian Assurance Co.*, 30 L. J. (N. S.), Ch. 511; *Moore* v. *Woolsey*, 4 E. & B. 243."

To read into these Massachusetts contracts, therefore, the Missouri statute forbidding the defense of suicide and nullifying provisions in the contracts limiting the company's liability to the reserve by virtue of the provisions that the policies should be considered Missouri contracts and construed in accordance with the laws of Missouri is clearly violative of the public policy of the State of Massachusetts and the provisions in the contracts that they should be considered Missouri contracts and construed in accordance with the laws of Missouri are not valid and enforceable, but, on the contrary, are invalid and not enforceable.

IV.

The circuit court of appeals held that "the suicide provision in each of the policies is in manifest conflict with the public policy of Missouri declared in the statute and the district court was not in error in sustaining the motion to strike the same where pleaded as constituting no defense in law to the suits on the policies." This holding is in conflict with the decisions of the Supreme Court of Missouri in the following cases:

Prentiss v. Illinois Life Ins. Co., 225 S. W. 2d 695, 705;

Parker v. Aetna Life Insurance Company, 289 Mo. 42, 232 S. W. 708, 713;

Lukens v. International Life Insurance Company, 269 Mo. 574, 575, 191 S. W. 418;

Lange v. New York Life Insurance Company, 254 Mo. 488, 498, 503, 504, 505, 162 S. W. 589;

and with the decisions of this court in

Mutual Life Insurance Company v. Hill, 193 U. S. 551, 24 S. Ct. 533.

These contracts are Massachusetts contracts. The Missouri Suicide Statute has no application to these cases at all and is not available to the respondents herein unless made so by the provisions in the contracts that they shall be considered and construed as Missouri contracts. To repeat what the Missouri Supreme Court said in *Lukens* v. *International Life Insurance Co., supra*:

> "If the contract was an Illinois contract and by reason thereof governed by the laws of that state, *as we hold*, although the suit is brought in the courts of this state, none of the provisions of the section are applicable to respondent's case nor available to her" (Emphasis ours).

It is obvious, therefore, that the public policy of Missouri, as declared by the Missouri Suicide Statute, is not in these cases at all, and is wholly immaterial.

But, under the decisions of the Supreme Court of Missouri, and of this Court, the provision in these contracts that they shall be considered and construed as Missouri contracts is inoperative for another reason, and here again the holding of the Circuit Court of Appeals that this provision required the application of the Missouri Suicide Statute to these contracts and that the District Court was not in error in sustaining the motion to strike the provision limiting your petitioner's liability under the policies to the reserves is in conflict with the decisions of the Missouri Supreme Court, and of this Court.

Of course, this provision that the contracts shall be considered and construed as Missouri contracts has no force or meaning at all if the contracts are in fact Missouri contracts. Without it, the contracts would be considered Missouri contracts and would be construed in accordance with the Missouri law. The contracts, however, are Massachusetts contracts and if this provision is to be given any effect, it must be because it is one of the terms of the contract and not by virtue of Missouri law. *Lange* v. *New York Life Insurance Company, supra.*

The contracts in these cases each provides:

> "* * * Death within two years from date of policy from suicide, while sane or insane, shall reduce the company's liability hereunder to the amount of the reserve hereon" (Tr. 61, Typical).

This is a specific provision. The provision in the policies

> "Any policy of insurance issued upon this application shall be considered a Missouri contract and its terms shall be construed in accordance with the laws of the State of Missouri unless otherwise specified herein by the applicant."

is a general provision, embracing all of the Missouri law with reference to such contracts of insurance. The spe-

cific provision, under universal rules of construction must control over the general.

In the case of *Lange* v. *New York Life Insurance Company, supra,* the Supreme Court of Missouri, dealing with this subject, on pages 503 and 504 of the official report, said:

> "On the other hand, if not in contravention of the laws and public policy of the place of contract, the contracting parties may stipulate to the effect that the laws, or a portion of the laws, of a foreign State shall control in construing the contract. And when such is the case, it then becomes necessary to look to the contract which the parties themselves have made in order to see what law of the foreign State shall control in the construction of the contract and be considered as a part thereof. Such is the present situation. The policy is a New Mexico contract. By one of its terms it provides that the policy shall be construed as though it were executed in the State of New York. By another of its terms it expressly waives the giving of any notice required by any statute. *The first provision, if not restricted by other terms of the policy, is sufficiently general to embrace all the New York law with reference to such contracts of insurance. The second provision is specific, and conflicts with the general stipulation in that it waives the notice of forfeiture which one of the New York statutes on the subject of insurance requires. One of the general rules of interpretation of contracts is that stipulations with reference to a definite and specific matter will control over a general clause*" (Emphasis ours).

In *Mutual Life Insurance Company* v. *Hill,* 193 U. S. 551, 24 S. Ct. 533, cited and followed by the Missouri Supreme Court in the Lange case, this Court, upon facts substantially similar to those involved in the Lange case, reached the same result, saying on page 558 of the official report:

"Obviously the express stipulation in the policy as to the matter of notice must be held paramount and to that extent limiting the provision of the New York law in reference to notice which was not specially referred to in the contract, and can be invoked only because it is one of the various statutes of New York applicable to insurance policies.

Now, of course, when the general provision in the contracts that they shall be considered and construed as Missouri contracts is so construed as to include the Missouri Suicide Statute in the contracts, it is in conflict with the specific provision limiting the liability of your petitioner under the contracts to the reserves thereon, from which it follows, as the night the day, that the provision that the contracts should be construed as Missouri contracts did not require the Federal Court of Missouri to apply the Missouri Suicide Statute in the trial of the cases in Missouri, and from which it follows, as the night the day, that the District Court did err in sustaining the combined motions to strike and for judgment on the pleadings.

In the cases cited by the Circuit Court of Appeals in its opinion—*Fidelity Loan Securities Co.* v. *Moore,* (Mo. S. Ct.) 280 Mo. 315, 217 S. W. 286; *Hansen* v. *Duvall,* (Mo. S. Ct.) 62 S. W. 2d 732, 739; *Brotherhood of Railway Trainmen* v. *Adams,* 222 Mo. App. 689, 5 S. W. 2d 96, and *Zarnecke* v. *Blue Line Co.,* (Mo. App.) 54 S. W. 2d 772—the principles controlling in these cases were not involved in any way whatsoever. They do not touch upon the question of the invalidity of the provision in the contract that the contracts shall be considered and construed as the contract of some other state than the state where the contract was made, where such provision is violative of the public policy of the state where the contract was made. They do not touch upon the question that where a specific provision of a contract is in conflict with a general provision, the specific provision must control.

V.

The circuit court of appeals held that respondents were entitled to recover Missouri statutory penalties and attorneys' fees for vexatious refusal to pay in each case, in addition to the face of the policy, interest and costs in each case. This holding is in conflict with the decision of the Supreme Court of Missouri in

First National Bank v. Security Mutual Life Insurance Company, 283 Mo. 336, 222 S. W. 832,

and with the decision of the Kansas City Court of Appeals in

Ayers v. Continental Ins. Co., 217 S. W. 550 (not officially reported).

Sec. 6040, R. S. Mo., 1939, the vexatious refusal statute provides:

> "In any action against any insurance company to recover the amount of any loss under a policy of * * * life * * * insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed ten per cent on the amount of the loss and a reasonable attorney's fee; * * *"

This statute has no extra-territorial effect. Even in a Missouri contract, it is not a part of the contract and the subject matter for construction. It is a part of the performance of the contract. It imposes a penalty for a vexatious refusal to perform the contract.

In *Ayers* v. *Continental Ins. Co.*, 217 S. W. 550, the Kansas City Court of Appeals said:

> "The payment of an attorney's fee was a part of the performance of the contract, and is governed by the law of Kansas, where the contract was made."

In *First National Bank* v. *Security Mutual Life Insurance Co.*, 222 S. W. 832, 837, 838, 283 Mo. 336, the contract

was a Texas contract and the appellant claimed that error was committed in allowing an attorney's fee. There, the Court said:

> "The appellant claims that error was committed in allowing an attorney's fee in behalf of respondent, for the reason that this is a Texas contract, and no statute of that state authorizing such an allowance was pleaded. In this contention appellant is clearly right. This contract was made in Texas. Respondent is a resident of Texas, paid the premiums there, and demanded performance of the contract in that state. The Texas statute, if any there is on this proposition, is not pleaded. We do not take judicial notice of the statutes of a sister state, and if such a statute as would authorize the allowance of an attorney's fee exists in that state, it should have been pleaded and proven in the same manner as any other fact. *Fidelity Loan Securities Co.* v. *Moore*, (Mo.) 217 S. W. 286, l. c. 289. The allowance of an attorney's fee relates to the right, and not to the remedy. No attorney's fee should have been allowed."

Since the contracts were made in Massachusetts, and were to be performed in Massachusetts, they are Massachusetts contracts, and the statutory penalties and attorneys' fees were not allowable under the law of Missouri in either case.

Wherefore, petitioner respectfully prays that a writ of certiorari issue in each of said cases.

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